Supreme Court, U.S.
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No. 92-932

In the Supreme Court of the United States

October Term 1992

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Date: January 8, 1993

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REPLY BRIEF

The Petition for a Writ of Certiorari has shown that this case raises a novel issue of growing importance -- the constitutional limits on state court jurisdiction based on telephonic and electronic communication across state lines. As transmission of information continues to represent an ever greater segment of the national economy, controversies similar to the present one inevitably will recur with increasing frequency. Various state and federal courts have reached drastically conflicting conclusions. This is an uncharted area of the law that cries out for guidance from this Court.

Respondents, J.R. and Laura Bennett ("the Bennetts"), in their Brief for Respondents have not contested that the issues raised by the Petition for a Writ of Certiorari are significant, are likely to be recurring, and have been left uncertain by prior decisions of this Court. Rather, the Bennetts have sought to confuse the Court by making misrepresentations as to the record (1) by conflating events relating to entirely separate transactions and (2) by asserting "facts" that have no support in the

record. They have sought to sow additional confusion by treating as interchangeable the different principles governing general and specific jurisdiction. The false impresseion created by these tactics should not be permitted to dissuade this Court that this is an appropriate case in which to resolve the concededly pressing issues raised by the Petition.

A. The Petition Raises No Factual Issues, Only Legal Questions.

The Bennetts argue that the Alabama Supreme Court's decision that Alabama had jurisdiction over petitioner ("Baker") was based on four findings of fact on which, the Bennetts say, there was conflicting evidence (Brief for Respondents, p. 2). The Bennetts regard these supposed findings as so telling that they refer to them four times in their Brief.[1] As petitioner has

[1] They actually go as far as to set forth the "findings" twice in full text, once at page 2 and a second time at page 6 of the Brief for Respondent. The facts that the Bennetts claim the Alabama Supreme Court "found," were not actually disputed. They were conceded by Baker to be true. The Alabama Supreme Court, of course, is an appellate court and does not make findings of fact.

shown, however, (Petition, Point II, pp. 27-29), those four undisputed facts have nothing to do with the present case. They relate to a completely independent transaction among other participants that was completed six months prior to the transaction between the Bennetts and Baker that gave rise to this case. They simply cannot be used to establish the existence of jurisdiction in this case under the Alabama long arm rule, Rule 4.2(a)(2)I, Alabama Rules of Civil Procedure.

The Bennetts complain (Brief for Respondents, p. 6) that "Baker attempts to confuse the issue by claiming that the Alabama Court's exercised general jurisdiction over him." Baker assumed arguendo that the Alabama courts were asserting general jurisdiction since it was clear they could not predicate specific jurisdiction on Baker's role in the independent transaction that did not give rise to the Bennetts' claim against Baker. Shaffer v. Heitner, 433 U.S. 186 (1977). But, as Point II of the Petition shows, decisions of this Court also preclude Baker's limited contacts with Alabama from serving as a basis for general jurisdiction over him with respect to the dispute in this case.

The Bennetts state (Brief for Respondents, p. 3) that the Petition "ignores a plethora of other contacts Baker had with Alabama," but the Bennetts do not cite even one example of other contacts and they provide no record reference whatsoever. The truth is that there is no evidence of any contacts in the record other than the four undisputed facts the Bennetts have called findings and testimony as to the three unsolicited phone calls to Baker in New York (Petition, p. 11). Their nonexistence is the reason the Alabama Supreme Court did not rely on such "contacts," not as the Bennetts claim (Brief for Respondents, p. 3), because the Alabama Supreme Court "felt" they were unnecessary to its decision.[2]

The Bennetts declare (Brief for Respondents, p. 6); "However, contrary to Baker's claim, the Alabama Supreme Court found specific jurisdiction over Baker pursuant to a traditional minimum contacts analysis." If that is what the Alabama Supreme Court did, it completely disregarded this Court's precedents, as the

[2]The Bennetts' statement as to what the Alabama Supreme Court "felt" is obviously pure speculation. It has no basis in the Court's opinion or in anything else in the record.

Petition demonstrates. If, however, the Alabama Supreme Court took into account the events relating to the earlier independent transaction, then the Court must have been trying to assert general jurisdiction, which also is prohibited by this Court's holdings. Either way, the Alabama Supreme Court acted unconstitutionally and has revealed a state of confusion that requires this Court's correction.

The Bennetts have sought by a verbal shell game to shift Baker's limited contacts with Alabama from one jurisdictional category to another in the hope of making the whole appear greater than the sum of its parts. If the Alabama Supreme Court accepted this as "a traditional contact analysis," then it is imperative that this Court instruct that tribunal, and others that may be equally misled, as to the constitutional requirements of traditional contact analysis.

B. The Full Faith and Credit Issue Was Raised In Timely Fashion.

The Bennetts concede that the due process issues raised by the Petition "were raised in a timely fashion and it is appropriate for this Court to consider them."

(Brief for Respondents, p. 3). They assert, however, that the choice of law and Commerce Clause issues were not raised in the trial court or in Baker's initial brief to the Alabama Supreme Court.

What the Bennetts refer to as the "choice of law issue" is actually a constitutional question of full faith and credit. It is true it was not raised in the trial court or in Baker's initial brief to the Alabama Supreme Court. It could not have been, because it had not yet arisen at either of those times. It appeared for the first time as a result of the Alabama Supreme Court's opinion holding Baker liable for innocent misrepresentation or innocent nondisclosure, which are actionable in Alabama but not in England, Florida, or New York -- the relevant jurisdictions. Baker then raised the full faith and credit issue immediately in his motion for reargument (Petition, Point III).

C. The Complaint Does Not Allege That Baker Is Liable For Innocent Misrepresentation Or Innocent Non-disclosure.

The Bennetts argue that the choice of law issue was not raised for the first time by the Alabama Supreme Court's holding that Baker could be held liable for

innocent misrepresentation or innocent nondisclosure "as the mistaken or innocent misrepresentation claim was expressly stated in the complaint" (Brief for Respondents, p. 7). As usual the Bennetts do not support their statement with any reference to the record. The reason in this instance is that their representation that the complaint alleges innocent misrepresentation is simply not true. A copy of the complaint is annexed as Supplement to Appendix, pages A-30 through A-48.

D. **The Alabama Courts Did Not Have Jurisdiction Over Baker Even If He Had An Alabama Agent (Which Was Never Established) Since Baker's Liability Did Not Arise From the Alleged Agency Or Any Act Of The Agent.**

The Bennetts argue "that Johnston the Alabama accountant who participated in the transaction was allegedly [sic] petitioner's agent." Because Johnston was in Alabama, the Bennetts argue, this gave the Alabama courts jurisdiction over Baker, who was in New York.

Whether Johnston was Baker's agent was strongly disputed. Even the Bennetts, however, never claimed that Johnston was Baker's agent for service of process or anything else related to jurisdiction. The point was

raised for the first time in the Brief for Respondents. It was, therefore, not considered by the Alabama courts.

In any event, there was never any determination that Johnston was Baker's agent. The case was submitted to the jury on a number of alternative theories of liability, only one of which was that Baker was vicariously liable for representations of Johnston, as Baker's agent. The jury rendered a general verdict. Alabama law is in accord with the general common law rule that, when a case is submitted to a jury on multiple theories, a reviewing court "may not presume that the jury returned its general verdict on a [particular] count . . . ." American Life & Accident Ins. Co. v. Lyles, 540 So.2d 696, 700 (Ala. 1989). Moreover, in holding that the trial court had jurisdiction, the Alabama Supreme Court did not rely on, or even mention, the alleged agency (A-18, A-19).

Furthermore, and conclusive on this issue, Baker's liability was not based to any extent on the alleged agency. Baker's liability was based on a conversation that Baker himself was alleged to have had with Bennett, not on any conduct of Johnston, the alleged agent. This

Court in Shaffer v. Heitner, 433 U.S. 186 (1977), held that, when the defendant is not subject to general jurisdiction and the claim sued upon is unrelated to the alleged contacts of the defendant with the state, the defendant has "no reason to expect to be hailed before the forum state's courts," and, therefore, that the state has no personal jurisdiction over the defendant with respect to the claim. Accordingly, even if Johnston were Baker's agent, that would be irrelevant.

E. The Commerce Clause Issue Was Raised Simultaneously With the Due Process Issue.

From the outset of the litigation, Baker has claimed that the Alabama trial court's exercise of personal jurisdiction over him was invalid under the United States Constitution. The authorities Baker cited, it is true, were principally due process cases under the Fourteenth Amendment. All the same considerations, however, apply under the Commerce Clause with the additional requirement of an impermissible burden on interstate commerce. The existence of that burden, however, is obvious if jurisdiction could be based on unsolicited

phone calls from the forum state (See Petition, pp. 35-38).

At the trial level, the Bennetts' had the burden of proof on jurisdiction, but they submitted absolutely no evidence at all on jurisdiction.[3] Baker's motions for a directed verdict and his motion for judgment notwithstanding the verdict raised the question whether there was a basis for jurisdiction on any legal theory at all.

Baker was not required at that juncture to show that the Alabama court lacked jurisdiction over him. This remained true, of course, on the appeal to the Alabama Supreme Court. It was only after the Alabama Supreme Court sua sponte found jurisdiction on the basis of Baker's participation in the prior unrelated transaction, an entirely different theory from that on which the appeal was briefed and argued, that the Commerce Clause issue became appropriate for presentation by Baker.

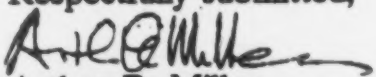
[3]The Bennetts did offer evidence as to the unsolicited telephone calls to Baker from Alabama as part of their proof on liability and evidence as to the prior independent transaction as background.

The issue of whether Baker should have raised the Commerce Clause earlier, even though the Bennetts had the burden of showing the Court's jurisdiction (including advancing some theory on which jurisdiction could be found to exist with respect to the transaction the Bennetts were suing on), is possibly a close question. However, since the Commerce Clause issue is so similar to the due process issue, if the Court rules against Baker on this point, it might regard this as an "appropriate circumstance" to consider the issue even though it was not presented at an earlier point in the lower court. Vance v. Ferrazas, 444 U.S. 252, 258-59 n.5 (1980).

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,



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v.

J.R. Bennett and Laura Bennett, Respondents

I hereby certify that I have served three (3) copies of the Reply Brief in Support of Writ of Certiorari to the Supreme Court of Alabama by first class mail, postage prepaid to counsel for respondents addressed as set forth below:

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All parties required to be served have been served.

Leon C. Baker

Dated: January 11, 1993

No. 92-932

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Leon C. Baker, Petitioner

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: January 8, 1993

IN THE CIRCUIT COURT FOR
MADISON COUNTY, ALABAMA

J.R. BENNETT and LAURA JEAN BENNETT, individuals,

Plaintiffs,

v.

LEON C., BAKER, an individual; S. DAVID JOHNSTON, an individual; GARY D. JOYCE, an individual; DANNY L. WIGINTON, an individual; R. THOMAS BEASON, an individual; DANNY L. ALM, an individual; HARVEY P. CUTTER, an individual; JOHNSTON, JOYCE & WIGINTON, an Alabama Partnership, FICTITIOUS DEFENDANTS "A", "B", and "C", being those persons, firms, corporations, partnerships or other entities of which Leon C. Baker was, at relevant times, a partner, director, officer, shareholder, member, representative, or agent and whose true names are unknown to plaintiffs at this time but will be added by amendment when ascertained; FICTITIOUS DEFENDANTS "D", "E", and "F", being those persons, firms, corporations, partnerships or other entities of which S. David Johnston was,

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at relevant times, a partner, director, officer, shareholder, member, representative, or agent and whose true names are unknown to plaintiffs at this time but will be added by amendment when ascertained; and FICTITIOUS DEFENDANTS "G", "H", "I", "J", "K", and "L", being those persons, firms, corporations, partnerships or other entities of which S. David Johnston was, at relevant times, a partner, director, officer, shareholder member, representative, or agent and whose true names are unknown to plaintiffs at this time but will be added by amendment when ascertained.

Defendants.

COMPLAINT

Come now the Plaintiffs, J.R. Bennett and Laura Jean Bennett, and as their complaint against the defendants, Leon C. Baker, S. David Johnston, Gary D. Joyce, Danny L. Wiginton, R. thomas Beason, Danny L. Alm, Harvey P. Cutter, Johnston, Joyce & Wiginton, and Ficticious Defendants "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", and "L", allege and aver as follows:

PARTIES

1. The Plaintiffs, J.R. Bennett and Laura Jean Bennett (hereinafter referred to as the "Bennetts" or the "Plaintiffs") are individual citizens of the State of Alabama with their residence in Marshall County, Alabama.

2. The defendant Leon C. Baker (hereinafter referred to as "Baker") is an individual resident of the State of New York. Baker is and was at all relevant times engaged in the private practice of law.

3. The defendant S. David Johnston (hereinafter referred to as "Johnston") is an individual resident of the State of Alabama with his residence in Madison County, Alabama. Johnston is and was at all relevant times a certified public accountant.

4. The defendants Gary D. Joyce, Danny L. Wiginton, R. Thomas Beason, Danny L. Alm, and Harvey P. Cutter (hereinafter collectively referred to as the "Johnston Partners") are individual residents of the State of Alabama with their residence in Madison County,

Alabama. The Johnston Partners are certified public accountants. Upon information and belief, the Plaintiffs aver that at all relevant times the Johnston Partners were partners of Johnston in the practice of accounting.

5. Johnston, Joyce & Wiginton (hereinafter referred to as "JJW") was at all relevant times a public accounting firm with its principal place of business in Madison County, Alabama. Upon information and belief, the Plaintiffs aver that JJW was a partnership organized under Alabama law with Johnston and the Johnston Partners as its partners.

6. Ficticious Defendants "A", "B", and "C" are the persons, firms, corporations, partnerships, or other entities of which Leon C. Baker was, at relevant times, a partner, director, officer, shareholder, member, representative, or agent and whose true names are unknown to the Plaintiffs at this time but will be added by amendment when ascertained.

7. Ficticious Defendants "D", "E", and "F" are the persons, firms, corporations, partnerships, or other

entities of which Leon C. Baker was, at relevant times, a partner, director, officer, shareholder, member, representative, or agent and whose true names are unknown to the Plaintiffs at this time but will be added by amendment when ascertained.

8. Ficticious Defendants "G", "H", "I", "J", "K", and "L" are those persons, firms, corporations, partnerships, or other entities of which Leon C. Baker was, at relevant times, a partner, director, officer, shareholder, member, representative, or agent and whose true names are unknown to the Plaintiffs at this time but will be added by amendment when ascertained.

FACTUAL AVERMENTS

9. Plaintiff J.R. Bennett completed the tenth grade and has no other formal education. Plaintiff Laura Jean Bennett completed the ninth grade and has no other formal education.

10. The Plaintiffs met Johnston in 1970 when Johnston became their personal accountant. From 1970 through 1985, Johnston performed accounting and tax

services for the Plaintiffs and various businesses in which the Plaintiffs were involved.

11. Through Johnston's rendering of accounting and tax services to the Plaintiffs, Johnston had first-hand knowledge of the Plaintiffs' financial condition. Because of the Plaintiffs' lack of knowledge of and inexperience in financial and tax matters. The Plaintiffs relied on Johnston's expertise in financial and tax matters.

12. In 1981, certain businesses in which the Plaintiffs were involved were financially successful. In July, 1981, Johnston contacted the Plaintiffs and told the Plaintiffs that they needed to place some of their income in a tax shelter. Johnston represented to the Plaintiffs that a lawyer friend of his, Baker, was involved with the perfect tax shelter for their needs. He further represented to the Plaintiffs that by placing money in this tax shelter they would be able to claim various deductions for income tax purposes including, but not limited to, depreciation and interest deductions which would greatly reduce their income tax liability.

13. For the purpose of soliciting investors to place money in the computer lease tax shelter, Johnston acted individually, on behalf of the Johnston Partners, as an agent for and representative of Baker, and as an agent for and representative of Ficticious Defendants "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K" and "L". Johnston, at the express direction of Baker, contacted and solicited investments from Alabama residents in the computer lease tax shelter.

14. Johnston explained to the Plaintiffs that their money would be used to purchase computer equipment which would then be leased. Johnston told the Plaintiffs that this transaction was very complicated but that it would enable the Plaintiffs to pay significantly less income taxes.

15. The Plaintiffs then asked Johnston whether he was sure that this transaction was "legal". Johnston knew of the Plaintiffs' lack of knowledge and expertise in tax matters and knew that the Plaintiffs would rely on his statements as facts regarding the income tax deductibility

of the computer lease tax shelter and that the income tax deductions conformed with the law. Johnston further stated that Baker would provide the Plaintiffs with an explanation of the specifics of the transactions. Thereafter, Baker provided the Plaintiffs with an explanation of the computer lease tax shelter that confirmed their prior conversation with Johnston regarding the various income tax deduction features of the computer lease tax shelter. (See Exhibit A attached hereto). Baker sent this explanation into Alabama.

16. Johnston further represented that Donald Gibbs, another client of Johnston's, had placed money in this tax shelter but that Gibbs was no longer in need of the full benefit offered by this tax shelter. Johnston represented that the Plaintiffs would be purchasing 1/2 of Gibbs' interest in this tax shelter. Johnston told the Plaintiffs that it would cost them around $150,000 to purchase 1/2 of Gibbs' interest in the Tax Shelter and that $42,000 in cash would be needed up front.

17. The Plaintiffs told Johnston that they were not in

a position to place $42,000 in the tax shelter at that time. Johnston then told the Plaintiffs that the deal was so good that he would lend the Plaintiffs this initial $42,000. The Plaintiffs then agreed to go forward and purchase 1/2 of Gibbs' interest and Johnston did in fact lend the Plaintiffs the initial $42,000 payment.

18. Thereafter, the Plaintiffs repaid Johnston the $42,000 loan and placed an additional $119,822.26 in the tax shelter.

19. For the years 1981, 1982, 1983, and 1984 Johnston, the Johnston Partners, and JJW prepared the Plaintiffs' income tax returns which included deductions for the various alleged tax benefits of the tax shelter.

20. In 1985, the Plaintiffs received notice from the Internal Revenue Service (hereinafter referred to as the "IRS") that it would conduct an audit of the Plaintiffs' income tax returns for the years 1981, 1982, 1983, and 1984.

21. The Plaintiffs then contacted Johnston and asked Johnston what they should do regarding the audit.

Johnston represented to the Plaintiffs that Baker would represent the Plaintiffs in connection with their IRS audit and that Baker would get the matter resolved. Johnston told the Plaintiffs to cooperate with the IRS but not to worry about the audit and that everything would be worked out to their benefit.

22. The Plaintiffs attempted to reach Baker by telephone on many occasions regarding his representation of them during the IRS audit, but Baker never returned their telephone calls. Thus, Baker did not represent the Plaintiffs in connection with the audit. The Plaintiffs retained other counsel at great expense.

23. By letter dated September 24, 1987, the Plaintiffs were informed by the IRS that its audit had revealed that the Plaintiffs had invested in what the IRS determined to be an "abusive tax shelter involving so-called computer leasing." (See Exhibit B attached hereto). The Plaintiffs received this letter on September 26, 1987.

24. As a result of the audit, the IRS assessed

Plaintiffs past due taxes, interest, and penalties in excess of $800,000. The Plaintiffs paid this assessment to the IRS in August, 1988.

COUNT ONE

Plaintiffs reassert and reallege paragraphs 1 through 24 of this Complaint as if set forth anew herein verbatim.

25. Johnston, the Johnston Partners, JJW, Baker, and Ficticious Defendants "A", "B", "C", "D", "E" and "F", negligently caused the Plaintiffs damages by:

(i) Advising the Plaintiffs to place money in the computer lease tax shelter;

(ii) Failing to investigate the computer lease tax shelter transactions to determine the validity of the income tax deductions offered by said tax shelter;

(iii) Including income tax deductions on the Plaintiffs' tax returns for the years 1981, 1982, 1983, and 1984 pursuant to the computer lease tax shelter without conducting said investigations; and/or

(iv) Concluding that said income tax deductions

were valid and including them on the Plaintiffs' tax returns for the years 1981, 1982, 1983, and 1984.

26. As a proximate cause of these defendants' negligence, the Plaintiffs have suffered emotional distress, incurred substantial income tax liability and legal expenses, and paid the IRS more than $800,000 in past due taxes, interest and penalties.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs demand judgment against these defendants in the amount of $1,500,000 (One Million, Five Hundred Thousand Dollars), together with interest and costs.

COUNT TWO

Plaintiffs reassert and reallege paragraphs 1 through 26 of this Complaint as if set forth anew herein verbatim.

27. The Plaintiffs and defendants Johnston, the Johnston Partners, and JJW had an agreement whereby these defendants agreed to prepare the Plaintiffs' income tax returns. The defendants agreed to prepare these income tax returns with due care.

28. These defendants breached their agreement with the Plaintiffs to prepare their income tax returns with due care by:

(i) Advising the Plaintiffs to place money in the computer lease tax shelter;

(ii) Failing to investigate with due care the computer lease tax shelter transactions to determine the validity of the income tax deductions offered by said tax shelter;

(iii) Including income tax deductions on the Plaintiffs' tax returns for the years 1981, 1982, 1983, and 1984 pursuant to the computer lease tax shelter without conducting said investigation; and/or

(iv) Concluding that said income tax deductions were valid and including them on the Plaintiffs' tax returns for the years 981, 1982, 1983, and 1984.

29. As a proximate cause of these defendants' breach of their contract with the Plaintiffs to use due care in preparing their tax returns, the Plaintiffs have suffered emotional distress, incurred substantial income tax

liability and legal expenses, and paid the IRS more than $800,000 in past due taxes, interest and penalties.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs demand judgment against these defendants in the amount of $1,500,000 (One Million, Five Hundred Thousand Dollars), together with interest and costs.

COUNT THREE

Plaintiffs reassert and reallege paragraphs 1 through 29 of this Complaint as if set forth anew herein verbatim.

30. Johnston, the Johnston Partners, JJW, Baker, and Ficticious Defendants "A", "B", "C", "D", "E" and "F", made the following representations to the Plaintiffs:

(i) The computer lease tax shelter offered legitimate and "legal" income tax deductions;

(ii) That Donald Gibbs was no longer in need of the benefits offered by that tax shelter and thus desired to divest himself of one half of his interest; and

(iii) That Baker would represent the Plaintiffs in

connection with their IRS audit.

31. These defendants knew these representations were false or without knowledge of the true facts, recklessly misrepresented them or were made by mistake but with the intention that the Plaintiffs rely upon them.

32. In reliance on said representations, the Plaintiffs placed over $160,000 in the computer lease tax shelter and included deductions related thereto on their income tax returns for the years 1981, 1982, 1983, and 1984.

33. The Plaintiffs discovered this fraud when the IRS assessed them for past due taxes, interest and penalties in August 1988, on the grounds that they had invested in an "abusive tax shelter involving so-called computer leasing."

34. As a result of the fraudulent representations and the Plaintiffs' reliance thereon, the Plaintiffs have suffered emotional distress, incurred substantial income tax liability and legal expenses, and paid the IRS over $800,000 in past due taxes, interest, and penalties.

WHEREFORE, PREMISES CONSIDERED, the

Plaintiffs demand judgment against these defendants in the amount of $10,000,000 (Ten Million Dollars), together with interest and costs. Plaintiffs demand both compensatory and punitive damages.

COUNT FOUR

Plaintiffs reassert and reallege paragraphs 1 through 34 of this Complaint as if set forth anew herein verbatim.

35. Johnston, the Johnston Partners, and JJW breached their fiduciary duties to the Plaintiffs by:

(i) Advising them to place money in "an abusive tax shelter";

(ii) Failing to properly investigate the computer lease tax transactions to determine the validity of the income tax deductions;

(iii) Including income tax deductions on the Plaintiffs' tax returns for the years 1981, 1982, 1983, and 1984 pursuant to the computer lease tax shelter without conducting proper investigations; and/or

(iv) Concluding that the income tax deductions were

valid and including them on the Plaintiffs' tax returns for the years 1981, 1982, 1983, and 1984.

36. As a result of the breach of fiduciary duty, the Plaintiffs have suffered emotional distress, incurred substantial income tax liability and legal expenses, and paid the IRS over $800,000 in past due taxes, interest, and penalties.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs demand judgment against these defendants in the amount of $10,000,000 (Ten Million Dollars), together with interest and costs. Plaintiffs demand both compensatory and punitive damages.

COUNT FIVE

Plaintiffs reassert and reallege paragraphs 1 through 36 of this Complaint as if set forth anew herein verbatim.

37. Johnston, Baker, and Ficticious Defendants "G", "H", "I", "J", "K" and "L", conspired to defraud the Plaintiffs by:

(i) Advising the Plaintiffs to place money in a computer lease tax shelter which the IRS termed "an abusive tax shelter"; and

(ii) by representing to the Plaintiffs that the income tax deductions offered by the tax shelter conformed with the law.

38. In reliance on said representations, the Plaintiffs placed over $160,000 in the computer lease tax shelter and included deduction related thereto on their income tax returns for the years 1981, 1982, 1983 and 1984.

39. The Plaintiffs discovered this fraud when the IRS assessed them for past due taxes, interest and penalties in August 1988, on the grounds that they had invested in an "abusive tax shelter involving so-called computer leasing."

40. As a result of these defendants' conspiracy to defraud the Plaintiffs, the Plaintiffs suffered emotional distress, incurred substantial income tax liability and legal expenses, and paid the IRS over $800,000 in past due taxes, interest, and penalties.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs demand judgment against these defendants in the amount of $10,000,000 (Ten Million Dollars), together with interest and costs. Plaintiffs demand both compensatory and punitive damages.

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JURY DEMAND

Please take notice that Plaintiffs demand trial by jury.

S/
Of Counsel